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ABSTRACT

Recent block grant legislation requires both state and local education agencies to provide private school students a range of services equivalent to that provided public school students. These requirements pose administrative and operational problems for state agencies, since these agencies must simultaneously avoid relationships with religiously oriented schools that would involve constitutionally prohibited degrees of government "entanglement" with religion. While entanglement issues may be easy for state agencies to avoid in the course of adopting some policies for providing services to private schools--policies involving dual enrollment, personnel sharing, and the provision of technical assistance or instructional services--other policies must be drawn up very carefully to avoid the entanglement problem. These difficult policy areas include the provision of instructional materials and the imposition of planning and reporting requirements. The few hints at policy guidelines offered in Supreme Court decisions seem to encourage requiring only simple and infrequent reports on planning and finances, and using the neutral grounds of the public school for program operations as much as possible. (Author/PGD)

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PUBLIC EDUCATION AND PRIVATE SCHOOLS:

Service Without Entanglement

An Issue Analysis Paper

Prepared for the Chief State School Officers
of the States of Alaska, Hawaii, Idaho,
Montana, Oregon and Washington

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PUBLIC EDUCATION AND PRIVATE SCHOOLS:
Service Without Entanglement

Introduction

The current program consolidation or "block grant" legislation requires both SEAs and LEAs to provide to private school students a range of services equivalent to those provided for students in public schools. This requirement has been an integral part of federal education legislation for at least a decade and a half. The difference now is that the requirements for providing equivalent services or making other "special arrangements" for students in private schools are given much more emphasis in the present legislation and are made even more specific than they have been in the past.

The question facing SEAs in their relationships with private schools which are religiously oriented--and the most rapidly-growing segment of private education is made up of such schools--is one of avoiding "excessive entanglement" between government and religion. For SEAs, therefore, the problem is not one of the ultimate constitutionality of the present legislation--that issue must be left to the courts--but rather the very practical question of how best to avoid specific potential problems: how to stay out of trouble.

This paper will examine the issue, therefore, not so much from a legal as from an administrative viewpoint. The specific alternatives offered in the latter part of this discussion are not in any manner to be construed as legal advice. (The only advice that can be offered is this: consult your attorney!) But it is possible to set forth what the block grant legislation seems to require, how these requirements are

related to the "entanglement" problem, how the issues involved differ from other government-religion issues which have arisen in the past, and what problems for SEAs seem likely to be emerging.

I. Requirements Placed on SEAs

For our purposes here, the exact block grant legislative language need not be repeated verbatim. In succinct summary, students enrolled in private elementary and secondary schools must be provided the same services available to public school students, either by way of exact replication of what is provided in public schools or through special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment).

These requirements apply both to the LEA and--to the extent that the programs are still subject to direct state authority--to the SEA as well. In fact, the requirements placed specifically on the SEA are even more detailed, for the SEA must assure that any programs funded under the legislation must provide for private school children such appropriate secular, neutral, and nonideological services, material, and equipment (as well as teacher training) as may be necessary.

But the requirements go further. If just paralleling the public school programs should not be feasible or necessary, as determined by consultation with private school officials, provision must be made for such "other arrangements" as will provide equitable services. And if the LEA chooses not to provide the fundable programs for their own public school students, then the SEA must make arrangements to assure that the

private school students will get the same materials and services to the extent that this would have occurred if the LEA had received and expended the available federal funds.

In addition to these provisions, there are continued the familiar "bypass" procedures, which allow the Secretary of Education to fund directly private school programs in states which have their own constitutional limitations regarding aid to nonpublic schools.

II. Overview of the "Entanglement" Concept

The requirements summarized above pose some very real administrative and operational problems for SEAs, problems which are of such importance as to become policy issues. How can the SEA faithfully and in good conscience carry out the requirements of the legislation, and at the same time avoid precipitating relationships which would involve "an impermissible degree of entanglement" between government and religion?

The "excessive government entanglement with religion" concept, which has emerged as one of the key tests used by the U. S. Supreme Court in deciding church-state issues in education, is of fairly recent origin. It first appeared in the 1970 Walz tax exemption case, though the Court used it negatively there in deciding that tax exemption of church-owned property did not involve an "excessive entanglement." The idea, though not the specific phrase, had been implicit in a couple of earlier cases, in which the Court had first ruled against on-school-site released time for religious instruction (McCollum, 1948) but had later permitted off-school-site released time (Zorach, 1952), presumably because such

instruction conducted on school property entangled the government and religion to an impermissible degree, whereas off-site religious instruction did not.

At any rate, by early 1970 the Court had adopted the excessive entanglement test as one of its key points of reference in deciding the constitutionality issues. Previously, the Court had relied primarily on the actual wording of the First Amendment with its twin establishment and free exercise clauses. In a sense, the Court invented a third clause: not only must the proposed action be examined to see whether it established a religion or prevented the free exercise thereof, but also whether it resulted in an impermissible degree of entanglement. Thus, in the 1971 Dicenso vs. Robinson case, the Court found that the Rhode Island salary supplement scheme would require "comprehensive, discriminating, and continuing state surveillance" over private schools, and was therefore unconstitutional. Similarly, in the 1971 Pennsylvania case of Lemon vs. Kurtzman, the Court, directly citing Walz, struck down a state law because the proposed arrangements were "pregnant with involvement" and "could encompass sustained and detailed administrative relationships" between government and religion.

III. Distinction Between "Entanglement" and Other Government-Religion Issues

It may be questioned why special attention needs to be given by SEAs to the "impermissible degree of entanglement" issue, when the whole church-state controversy has been so thoroughly examined in numerous court cases over so long a period of time, and fairly reasonable and

workable accommodations have been hammered out. The response to this question would be, first, that the new legislation, although not really differing a great deal from what we have been used to, is coming at a time when there are many other pressures on the public schools to share scarce resources with private schools, and even to be substantially replaced by private education. Second, the entanglement issue is simply not like the other issues which have arisen in the church-state-education arena.

There is not involved here just a fairly clear-cut "child benefit" theory, such as was present when the Supreme Court ruled that transportation could be provided at public expense to private school students (Cochran, 1930), and could textbooks (Everson, 1947), as a simple, uncomplicated educational benefit to which all children might be considered to be entitled.

Nor are the problems facing SEAs in implementing the present legislation a clear parent benefit issue such as is found in the relatively straight-forward proposal for government sponsored income transfer through tuition/tax credits.

The entanglement issue is a good deal more complicated than the Bible reading and school prayer cases, in which the Court could make its findings almost solely on the basis of the "establishment" and "free exercise" clauses.

Finally, the entanglement issue does not have its roots in the basic philosophical, scientific, and religious disagreements which cloud and complicate the current "creationist" controversy in the public school curriculum.

The excessive entanglement issue, as it will be faced by SEAs, revolves around some very specific policy operation questions. Where are we headed with this thing? Where do we want to go? How do we handle specific cases before they get to be problems? The whole area of service without entanglement is still so new, so vaguely defined, that a clearly delineated set of educational policy options is impossible to formulate. So, rather than providing clear-cut policy options, we will have to deal only with setting forth the policy issues which may have to be considered.

IV. Some Likely Problem Areas

As SEAs attempt to live up to their obligations to extend the benefits of federally supported programs to students in private schools, particularly those schools which are religiously oriented, there are a number of avenues through which services and materials for these schools might be provided. Each of these avenues presents some possible "entanglement" problems, ranging from very minor to rather serious. A few of the likely problem areas are described below.

Dual enrollment. Where permitted by state law, enrolling private school students for special programs or courses does not seem to pose many difficulties. The student retains his or her primary membership in the student body of the private school, but when attending a given class in the public school or participating in a special program there, becomes for that purpose and for that period of time a public school student. It's a fairly clean-cut arrangement, with few if any entanglement

problems. In addition, the SEA typically has little involvement in such arrangements, because the administrative details are usually worked out at the LEA level.

SEA provision of technical assistance. Whether the service offered is direct technical assistance to private schools, or indirect assistance given through staff development programs, SEA provision of such services would seem to pose relatively little entanglement problem. To avoid possible criticism or adverse political repercussions, it would probably be advisable to offer such assistance/training to mixed (i.e., public/private) groups in neutral (i.e., public school) settings.

Shared personnel. Sending public school system employees, either LEA or SEA, directly into private schools to perform regular professional services (e.g., teaching, testing, diagnosing), though not an uncommon practice in some areas, poses some real problems. So long as it is made very clear that the public employee whose services are being shared with a private school remains wholly and completely subject to the supervision and personnel policies of his employer, and that the services are being rendered to children and not to institutions, the potential for "entanglement" is reduced, but questions could still be raised about the legitimacy of using public funds to share the private institution's expense of hiring its own personnel.

Providing instructional services. Some of the services mentioned in the paragraph above are sometimes offered to private school students only on the condition that the student come to the public school site. Because this arrangement does not involve the movement of public school personnel nor require their presence on a private school site, little institutional entanglement is likely. In a sense, this scheme is an

informal sort of dual enrollment--the private school student simply comes over to the public school and becomes its student for the period necessary to undergo the testing, the diagnosis, the remedial instruction or whatever.

Providing instructional materials. This is a really sticky area, especially in the light of the Ohio case (Wolman vs. Walters, 1977) in which the Supreme Court, by virtue of tortuous reasoning through a labyrinthian jungle of rhetoric, held that some instructional materials, but not others, could be constitutionally provided to private schools with public funds. Textbooks, they ruled, were "ideological," and thus prohibited, but maps and charts were not, and therefore permitted. The Court didn't say what to do about geography books! Even though the general practice has been to emphasize that the materials are not given to the private school, but have merely been loaned to the students there, the entanglement possibilities are a clear potential. What is not at all clear is a satisfactory resolution of the problem.

Planning requirements. This is another murky area. Now that the SEA, rather than the federal education authorities, must specify the nature and extent of the required local plan, and utlimately pass on its adequacy, there will be an understandably strong temptation on the part of state authorities to make the planning requirements quite detailed in order to have reasonable assurance that the money is being directed toward the specified target groups and that the funds are being properly expended. If the same planning requirements are imposed by the state on private as on public schools--as in all fairness it would appear that they ought to be--serious entanglement problems are possible.

Reporting requirements. Now that the SEA may require such fiscal and programmatic report data as it (not the Federal Department of Education)

deems necessary, the SEA will probably have considerable difficulty in setting up the reporting requirements for private schools without running into the "entanglement" problems described by the Supreme Court in the Lemon-Kurtzman case: "sustained and detailed administrative relationships" between the government agency and the private/religious institutions.

V. Some Possible Policy Directions

As was indicated earlier in this paper, the Supreme Court has unequivocally stated that an "impermissible degree of entanglement" between government and religion in educational matters is clearly unconstitutional. Unfortunately, the Court has not specified what is "impermissible." But there are some clear hints.

First of all, the phrase quoted in the preceding paragraph: "sustained and detailed administrative relationships." This would suggest that the SEA might be well advised, as a matter of basic educational policy, to make its requirements for nonpublic schools, especially in planning and reporting, as infrequent (as opposed to "sustained") and as general (as opposed to "detailed") as possible.

A second hint from the Court is found in the Dicerso vs. Robinson case already cited, in which the Court spoke forcefully against the "comprehensive, discriminating, and continuing state surveillance required." Any requirements which the SEA imposes which would seem to demand constant looking-over-the-shoulder of the private school, or making discriminatory judgments about what was going on there--these would seem to constitute an impermissible degree of entanglement.

A third hint comes in the difference between the Court's findings in the two released time cases cited earlier (McCollum and Zorach). "Where" makes a lot of difference: if you release children from regular classes to attend religious instruction on the school grounds, that's wrong; but if you release them to go off-campus for the same instruction, that's quite all right.

With these few general hints from the highest Court, the SEA must proceed to carry out its statutory obligations under the federal support legislation to provide services to private schools and/or their students equal to those provided to public schools and their students in the same programs.

Obviously, SEAs can do nothing in violation of state law, and these laws vary significantly from state to state. For example, just because providing textbooks or transportation services to private school children is constitutionlly permissible, no state is required to do these things if its own constitution or statutes forbid. Likewise, whenever a state finds it legally impossible to do the specific things required by the consolidation legislation, it must of necessity rely on the "bypass" process.

Nevertheless, most SEAs can in good conscience do essentially what the consolidation legislation requires and still stay out of difficulty with entanglement problems. If there are any general policy guidelines, which could be even tentatively offered, they might be these:

1. In planning and reporting requirements--simplicity and infrequency are the safest bet.

2. In program operation--insofar as possible, keep everything (personnel, services, materials) on neutral ground: i.e., in the public school setting.